attached to sub-section (i) can be waived. The object of the condition is to enable an accused person to study a report with a view to requiring the person making the report to be called as a witness. In this case there could have been no reason either for the Court or the appellant to require the Chemist to appear as a witness. The appellant's defence was unaffected by this error in procedure. The report was not inadmissible *per se* but only because notice had not been given to the accused. In all the circumstances, I consider that the admission of the report as evidence was an irregularity and not an illegality and can be cured by section 422 of the Criminal Procedure Code. The appeal against conviction is accordingly dismissed.

As regards sentence, Mr. Nair submits that it was wrong for the learned President to conclude that the appellant was acting in concert with others and impose a substantial fine or imprisonment in default. I think the conclusion was justified and, had the learned President imposed a sentence of 3 years imprisonment I could not have said that the sentence was excessive. The appeal against sentence is dismissed.

Appeal dismissed.

GOH TONG v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson & Taylor, J.J.) November 23, 1953]

[K.L. — Criminal Reference No. 3 of 1953]

Criminal Procedure Code (Cap. 6), ss. 173 and 399 — Commencement of trial for the purpose of.

This was a Reference from the High Court acting in its appellate capacity to the Court of Appeal as to the meaning of the phrase: "commencement of the trial" in section 399. The view of the High Court in this case was at variance with its decision in another case[1] on a similar point.

Held: in section 399 "commencement of the trial" necessarily means commencement of the contentious phase, i.e., of the trial itself. The phrase does not occur in section 173 and for the purposes of that section the trial begins with the framing of the charge which means, in practice, the approval by the Court of this draft charge entered beforehand by the prosecution.

Judgment in **Goh Tong v. Public Prosecutor** (1953) M.L.J. 167 reversed.

Obiter dictum: Where a Judge disagrees with a reported decision, and his judgment may create a direct conflict between the two judgments of the High Court, it will be preferable for the Judge to refer the point to the Court of Appeal with an indication of his reasons for doubting the validity of the authority, rather than to refuse to follow the reported decision.

Case referred to:—

(1) *Public Prosecutor v. Tay Tuan* (1953) M.L.J. 20.

CRIMINAL REFERENCE.

C. S. Jayaswal for the appellant.

P. G. Clough (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Mathew, C.J.: — Section 399(i) of the Criminal Procedure Code enacts that certain technical facts, including the contents of materials alleged to contain opium, may be proved by documentary evidence, provided that a copy of the certificate of the expert is delivered to the accused ten days before the commencement of the trial.

In *Tay Tuan's case*[1], it was held, in a considered judgment on this point alone, that the phrase "commencement of the trial" in section 399 means the commencement of hearing the evidence for the prosecution after the accused has claimed to be tried.

In the case before us, the accused was first brought before the Sessions Court on 6th November, 1952, when the charge was explained to him; apparently he was not then called upon to plead and did not plead. On the 9th of December the accused was formally charged, and claimed trial, and the case was postponed to 30th December for trial. Before that date, other business made it impracticable for this case to be heard, and the Court fixed a later date, namely 24th February, and so informed the parties beforehand.

On the 30th December the accused did not appear, but his counsel was present. On 23rd January 1953 a copy of the certificate was delivered to the accused. On 24th February the case was heard and the accused was convicted. Apart from that certificate there was no evidence whatever that the packets in accused's possession in fact contained opium which was an essential element of the charge. The accused was convicted.

He appealed to the High Court, and it was there argued that since an accused must be brought before the Court on the day following his arrest, and is then charged, section 399 could scarcely ever apply in a Sessions or Magistrate's Court if, for that purpose, the trial commenced with the explaining of the charge. The learned Judge held that a trial commenced with the charging of the accused. He disagreed with the reported decision in *Tay Tuan's case supra*, and quashed the conviction. He added however that his decision had created a direct conflict between two judgments of the High Court, and he referred the question to this Court. In our opinion, it would have

been preferable for the learned Judge to have referred the point to this Court with an indication of his reasons for doubting the validity of the authority, rather than to refuse to follow a reported decision.

The fallacy lies in the implied assumption that a given phrase must have precisely the same connotation in each context. The primary meaning may be modified in so far as is necessary to avoid frustration of a statutory provision. It is true that the plea of the accused is an essential step and is in that sense a part of the trial, but for this purpose there is no valid distinction between explaining the charge and calling for the plea. They are both parts of the same phase, section 173(a). It is not improper, and it may be convenient, to inform the accused that he need not plead immediately; but if he chooses to plead, and forthwith does so, he is entitled to have his plea recorded. The practice of separating explanation and plea can be supported in law only by the general power of the Court to adjourn a trial at any stage.

In our opinion, the decision in *Tay Tuan's case supra* was correct, though we do not think the reason for it was accurately stated. The phrase "commencement of the trial" is not technical. In lay English many a man pleads guilty to avoid a trial. In section 399 commencement necessarily means commencement of the contentious phase. In section 173 the phrase does not occur, but for the purposes of that section the trial begins with the framing of the charge which means, in practice, the approval by the Court of the draft charge entered beforehand by the prosecution.

Under section 34(1) of the Courts Ordinance we are required to re-hear the appeal. The power to deliver a declaratory judgment does not apply (sections 33 and 34(5)).

It follows that the judgment of the High Court must be reversed, and the conviction restored. If the order for the refund of the fine has already been carried out, the Public Prosecutor may make an application he is advised to make to the President of this Court. If, however, execution of that order has been suspended, it may be formaliy quashed by the order to be made pursuant to this judgment.

Reference answered.